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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO SANTANA VASQUEZ,

Defendant and Appellant.

F056121

(Super. Ct. No. F06906110)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Ralph Nunez, Judge. (Retired Judge of the Fresno Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Grace L. Suarez, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Brian Alvarez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Levy, J., and Dawson, J.

Appellant, Alejandro Santana Vasquez, pled no contest to two counts of lewd and lascivious conduct by force with a child under the age of 14 (Pen. Code, § 288, subd. (b)).¹ On appeal, Vasquez contends the court: 1) abused its discretion when it denied his motion to withdraw his plea; and 2) violated the terms of his negotiated plea when it imposed a restitution fine of \$2,200. We will affirm.

FACTS

Vasquez molested the nine-year-old victim over a period of at least a year. On August 14, 2006, the district attorney filed a complaint charging Vasquez with two counts of rape of a child under the age of 14 (counts 1 & 2/§ 296), one count of sodomy of a child under the age of 14 (count 3/§ 296), and four counts of forcible lewd and lascivious conduct with a child under the age of 14 (counts 4-7/§ 288, subd. (b)(1)).

On April 24, 2008, Vasquez pled no contest to counts 4 and 5 in exchange for the dismissal of the remaining counts and a stipulated term of 11 years, the aggravated term of eight years on one count and a consecutive, mitigated term of three years on the second count. During the hearing, the following colloquy occurred between the court and Vasquez's defense counsel, Ralph Torres:

“THE COURT: ... Mr. Torres, the parties have reached an agreement in this case that Mr. Vasquez will plead to Counts Four and Five, and *there will be an 11-year term stipulated?*

“MR. TORRES: Yes, your Honor. Depending on -- *this would be the base term, would be 8 plus 3, for 11. Other counts would be dismissed.*” (Italics added.)

After Torres stated that the agreement also included the dismissal of a “traffic matter,” the prosecutor acknowledged on the record her agreement with Torres's recitation of the plea bargain with the exception of certain minor amendments she wanted to make to the two counts. Torres then presented a change of plea form to the court that

¹ Unless otherwise indicated, all further statutory citations are to the Penal Code.

had been signed, and each paragraph initialed, by Vasquez. The first paragraph of this form provided that Vasquez would plead no contest to “ct 4, 288(b)(1) PC; ct. 5 288(b)(1) PC conditioned on stip. 11 yr term, Dismiss all other cts.” Under the heading, “CONSEQUENCES OF PLEA OF GUILTY OR NO CONTEST,” paragraph 3b advised Vasquez that he “could be fined up to \$10,000 and ordered to pay restitution in the minimum amount of \$200, and up to \$10,000.” Additionally, Torres signed a statement on the form acknowledging that he explained the consequences of the plea to Vasquez. Interpreter Ivonne Litman signed a statement on the form acknowledging that she translated the form to Vasquez and that he indicated he understood its contents.

In response to questioning by the court, Vasquez stated that he went over the change of plea form with defense counsel Torres with the help of the interpreter, he signed and initialed the form, and he completely understood everything that was on it. The court also asked defense counsel and the interpreter whether the statements they signed on the change of plea form were correct and they each stated that they were.

On July 17, 2008, Vasquez appeared with attorney Eric Green.

On July 22, 2008, attorney Green filed a motion to withdraw plea on Vasquez’s behalf. In an attached declaration Vasquez alleged that at the change of plea hearing defense counsel Torres advised him that he would receive a three-year term in exchange for his plea and that he did not find out until after the hearing that he had agreed to an 11-year term.

On September 11, 2008, at a hearing on the motion, the prosecutor introduced a declaration from interpreter Litman attesting that in the course of her duties she informs all defendants of the exact content of the plea form that is presented to her and that her signature on the Vasquez’s change of plea form indicated she translated the form to Spanish for Vasquez and that Vasquez indicated he understood the contents of the form. Attorney Torres testified that it was his practice to discuss offers with clients and provide

them all information especially with regard to the number of years the potential plea might involve. He was sure he did that with Vasquez. Torres also testified that it was also his practice to explain that stipulated meant “no more or no less. That’s what you get, so expect it.” After hearing arguments, the court denied the motion without comment. The court then sentenced Vasquez to the stipulated term of 11 years. The court, without objection, also imposed a restitution fine of \$2,200.

DISCUSSION

The Motion to Withdraw Plea

Vasquez contends the court abused its discretion when it denied his motion to withdraw his plea because: 1) the prosecution did not present any witness who had a specific recollection of what was said to Vasquez at the change of plea hearing; and 2) the court did not comply with California Rules of Court, rule 4.412(b).² Thus, according to Vasquez, the court abused its discretion when it denied his motion to withdraw his plea. We will reject these contentions.

“A defendant may move the trial court to set aside a guilty plea for good cause at any time before the entry of judgment. [Citation.] ‘Good cause’ means mistake, ignorance, fraud, duress or any other factor that overcomes the exercise of free judgment and must be shown by clear and convincing evidence. [Citation.] The grant or denial of such a withdrawal motion is ‘within the sound discretion of the trial court and must be upheld unless an abuse thereof is clearly demonstrated.’ [Citation.] We are required to accept all factual findings of the trial court that are supported by substantial evidence. [Citation.]” (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 917-918.)

“Where two conflicting inferences may be drawn from the evidence, it is the reviewing court’s duty to adopt the one supporting the challenged order.” (*People v. Hunt* (1985) 174 Cal.App.3d 95, 104.)

² All further rule references are to the California Rules of Court.

At the hearing on Vasquez's motion, no one testified to specifically explaining to him that the agreement provided for a stipulated 11-year term. However, the record contains other evidence that supports the court's implicit finding that Vasquez knew prior to entering his plea agreement that it provided for an 11-year term. Prior to the change of plea form being presented to the court, attorney Torres and the court each stated that the plea bargain provided for a *stipulated 11-year term*. Further, the first paragraph of the change of plea form stated that Vasquez would plead no contest to two counts of lewd and lascivious conduct with a child under the age of 14 in exchange for the dismissal of the remaining counts and *a stipulated 11-year term*. Vasquez initialed this paragraph and signed a paragraph at the end of the form acknowledging that he read, understood, and initialed each item on it. Additionally, attorney Torres signed an acknowledgement on the form indicating that he explained the consequences of Vasquez's plea to him and the interpreter a paragraph acknowledging that she translated the form to Vasquez and that he understood its contents. At the hearing on Vasquez's motion, attorney Torres testified it was his practice to advise his clients of the consequences of his/her plea and even though he did not have a specific recollection, he was sure he did that with Vasquez. The prosecutor also submitted a declaration from the interpreter wherein she acknowledged that it was her practice to translate to defendants all information in the change of plea form, that her signature on Vasquez's change of plea form indicated that she translated the form to Vasquez, and that Vasquez indicated he understood the contents of the form.

Vasquez's reliance on rule 4.412.5 is unavailing. Vasquez contends that rule 4.412(a) requires that a defendant "personally and by counsel" agree to the sentence to be imposed and that the court recite on the record the agreement and lack of objection to it by the prosecutor. Vasquez further contends that since that did not happen here, his stipulated plea is invalid. Vasquez is wrong.

Rule 4.412(a) provides:

“It is an adequate reason for a sentence or other disposition that the defendant, personally and by counsel, has expressed agreement that it be imposed and the prosecuting attorney has not expressed an objection to it. The agreement and lack of objection must be recited on the record. This section does not authorize a sentence that is not otherwise authorized by law.”

It is clear from the plain wording of rule 4.412(a) that this rule addresses the court’s duty to state reasons for its sentencing choices and relieves the court of its duty to do so if the conditions enumerated therein are met. (*People v. Valenzuela* (1991) 230 Cal.App.3d 1157, 1162.) It does not, as Vasquez suggests, deal with the validity of a defendant’s plea, nor does the failure to comply with this rule invalidate a defendant’s plea. Thus, we conclude that the court did not abuse its discretion when it denied Vasquez’s motion to withdraw plea.

The Restitution Order

Vasquez relies on *People v. Walker* (1991) 54 Cal.3d 1013 (*Walker*) to contend that imposition of a \$2,200 restitution fine violated the terms of his negotiated plea agreement because a restitution fine was not discussed during the change of plea proceedings. We disagree.

In *Walker*, the defendant negotiated a plea agreement in which one of two felony charges was to be dismissed and the defendant was to plead guilty to the remaining charge and receive a five-year sentence and no penalty fine. He was not advised of an additional mandatory restitution fine of at least \$100 but no more than \$10,000. Nor was he advised of his right to withdraw his plea under section 1192.5.³ Although the

³ Section 1192.5, in pertinent part, provides: “If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of

probation report recommended a \$7,000 restitution fine, the court imposed a fine of \$5,000. The defendant did not object to the imposition of the fine at sentencing.

The *Walker* court held (1) the imposition of the \$5,000 restitution fine “was a significant deviation from the negotiated terms of the plea bargain” and therefore violated the plea bargain; (2) because the section 1192.5 advisement was not given, the error was not waived by the defendant’s failure to object; and (3) the error was not subject to harmless error analysis. (*Walker, supra*, 54 Cal.3d at pp. 1029-1030.) The court reduced the fine to the statutory minimum, an amount that was not a significant deviation from the plea agreement. (*Id.* at p. 1030.)

In *People v. Crandell* (2007) 40 Cal.4th 1301, the defendant entered into a plea bargain that did not address the amount of restitution fine imposed. However, during the change of plea proceedings the court advised the defendant that he would be subject to a restitution fine of \$200 to \$10,000 and ascertained that the prosecution had not made any other promises beyond that defendant would be sentenced to 13 years. The court found that these circumstances indicated that the parties intended to leave the amount of the restitution fine to the discretion of the court. (*Id.* at pp. 1310-1311.)

The change of plea form advised Vasquez that he could be fined \$10,000 and that he could be ordered to pay restitution from \$200 to \$10,000. Thus, he could have been ordered to pay up to \$20,000 in fines and restitution. Vasquez was ordered to pay a restitution fine of only \$2,200. Therefore, Vasquez was adequately informed of the consequences of his plea and the court did not violate his plea agreement.

DISPOSITION

The judgment is affirmed.

the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so.”